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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-326

ERNEST E. BYRD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOHN H. TREANOR, JR.
JOHN L. SMITH, JR.
Suite 202, Presidential Bldg.
6525 Belcrest Road
Hyattsville, Maryland 20782
Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393 0625

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this case on March 16, 1973.

CITATIONS TO OPINIONS BELOW

The Judgment (and attached Memorandum) of the United States Court of Appeals for the District of Columbia is appended hereto as Appendix A.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia was entered on March 16, 1973. The petition for rehearing en banc followed on June 21, 1973. See Appendix B. By order dated July 20, 1973, the time to file this petition for Writ of Certiorari was extended to August 20, 1973. The jurisdiction of the Court is invoked under Title 28 U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in that the trial judge improperly denied petitioner's motion for dismissal of the indictment following the failure of the United States to keep an original plea bargain with the petitioner.

2. Whether the petitioner was denied due process of law in that the United States Attorney, through his assistants, improperly argued to the United States Court of Appeals for the District of Columbia that petitioner breached the plea bargain despite the prosecutor's knowledge that the United States initially broke the bargain.

CONSTITUTIONAL AND STATUTORY REFERENCES

Constitution of the United States, Amendment V

"(No person shall) be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, Ernest E. Byrd, hereinafter "petitioner", is a restauranteur in Washington, D. C. In the late evening

hours of October 22, 1969, at The Sportsman's Lounge in the District of Columbia, he was involved in a dispute with his former attorney, James F. O'Donnell. During this dispute, petitioner produced a loaded pistol and there ensued a struggle over possession of the weapon. Several shots were fired, one bullet grazing the leg of a mutual acquaintance, Stanley Janulewicz. Following the arrival of the police, petitioner was arrested and charged with assaulting both men and carrying a pistol without a license, in violation of 22 D. C. Code 502 and 22 D. C. Code 3204.

There then followed an agreement or plea bargain between petitioner (represented by counsel) and the Assistant United States Attorney in the then Court of General Sessions whereby the petitioner agreed to plead guilty to two misdemeanors – each of which carried a maximum punishment of one year's imprisonment. (22 D.C. Code 504 and 22 D.C. Code 3204). Petitioner desired to avoid the consequences of a felony conviction primarily because such a conviction would have the effect of making him ineligible to continue as the operator of establishments licensed by the Alcoholic Beverage Control Board for the District of Columbia. The United States promised in this plea bargain not to seek an indictment on prospective felony charges legally implicit in the incident at The Sportsman's Lounge. Petitioner therefore plead guilty to the aforementioned two misdemeanors in the Court of General Sessions and awaited sentence while remaining on bond.

Prior to the sentence date, the Assistant United States Attorney informed petitioner, through his counsel, that the United States would seek felony indictments after all. This Assistant informed petitioner's present counsel, who by now had replaced earlier counsel, that the bargain was

being broken because one of the complainants, James F. O'Donnell, Esquire, who had often represented petitioner before the Alcoholic Beverage Control Board for the District of Columbia, had complained to the then United States Attorney for the District of Columbia, Thomas A. Flannery, of the insignificance of the misdemeanor pleas afforded petitioner, whereupon the United States Attorney had ordered his Assistant to seek a felony indictment from the Grand Jury, despite the terms of the plea bargain. The Assistant United States Attorney offered to permit the petitioner to withdraw his guilty pleas to the two misdemeanors but told him that whether or not he did, the matter would be presented to the Grand Jury where a felony indictment would be sought. Following this breach of the plea bargain, petitioner and the United States entered into an informal agreement whereby the petitioner was promised that in return for his acting as an informant in matters pertaining to police corruption, the Assistant United States Attorney, would, should petitioner's efforts prove valuable enough, recommend to the United States Attorney that misdemeanors *again* be offered even should an indictment be handed down as promised earlier.

The sentencing date was then set for the misdemeanors with the petitioner being on the horns of a dilemma; since he had already been informed that no matter what actions he took regarding withdrawal of his guilty pleas to the two misdemeanors, that felonies would none the less be forthcoming, he chose to withdraw his guilty pleas, but only when the sentencing judge in the Court of General Sessions announced, even prior to any decision by petitioner, that he (the judge) had decided to commit the petitioner to Saint Elizabeth's Hospital for a mental examination. Hearing this and realizing that the issue of

the broken plea bargain could be raised anew post-indictment in the United States District Court, petitioner, with the consent of the United States, withdrew his guilty pleas and the United States dismissed the charges. Petitioner was then indicted by the Grand Jury in the United States District Court for the District of Columbia, despite petitioner's appearance before that body. The indictment was filed March 25, 1970, and in it petitioner was charged in seven counts with two counts of assault with intent to kill while armed, 22 D. C. Code, Section 501 and 3202; two counts of assault with intent to kill, 22 D. C. Code 501; two counts of assault with a dangerous weapon, 22 D. C. Code 502, and one count of carrying a dangerous weapon, 22 D. C. Code 3204.

Petitioner filed a pre-trial motion praying dismissal of the indictment for a number of reasons, one of which was the broken plea bargain. (Appendix C, Trial Transcript P. 29-33). Following his conviction, by jury, on February 9, 1972, of two counts of assault with a dangerous weapon and a single count of carrying a dangerous weapon, petitioner filed a motion to set aside the verdict, assigning the broken plea bargain as the main ground. (Appendix A). Both motions were denied by the trial judge and on April 3, 1972, petitioner was sentenced to eighteen to fifty-four months on one count of assault with a dangerous weapon; one to three years on the other count of assault with a dangerous weapon and one year for carrying a dangerous weapon; the term of imprisonment to run concurrently. The trial judge directed that petitioner be incarcerated for four months and suspended execution of the remainder of the sentence. This sentence has not yet been served.

Petitioner filed a timely appeal in the United States Court of Appeals for the District of Columbia. Four issues were raised:

(1) The Trial Judge improperly denied Appellant's motion for dismissal for lack of speedy trial.

(2) The Trial Judge improperly denied appellant's motion for dismissal upon failure of the government to fully comply with Rule 16, Federal Rules of Criminal Procedure.

(3) The Trial Judge improperly denied appellant's motion for dismissal of the indictment which followed the government's failure to keep an original agreement with the appellant. Appendix E.

(4) The Trial Judge improperly refused appellant's request for instruction on the lesser included offenses of both simple assault and threats to do bodily harm.

Attached as Appendix F is, in pertinent part, the portion of the brief filed in the United States Court of Appeals by the United States. The United States accused the petitioner of breaching the plea bargain, assigning petitioner's withdrawal of the misdemeanor pleas as an act excusing the United States of any duty to honor its agreement. Pursuant to its rules, the United States Court of Appeals heard no oral argument and was thus faced with the conflicting claims of the litigants as to the blame for the breach of the bargain. The United States Court of Appeals apparently felt that petitioner abrogated the agreement, "whatever it might have been."

On March 16, 1973, the United States Court of Appeals affirmed. An en banc hearing was denied on June 21, 1973.

REASONS FOR GRANTING THE WRIT

I.

THE REFUSAL OF THE TRIAL JUDGE TO EXERCISE HIS DISCRETION, DISMISS THE INDICTMENT AND GRANT SPECIFIC PERFORMANCE OF A BARGAIN MADE BY THE UNITED STATES AND THE PETITIONER, VIOLATES DUE PROCESS.

The United States Attorney for the District of Columbia, because of the unique nature of the District of Columbia, is charged with not only the prosecution of the various Federal criminal violations, (mainly Title 18, United States Code) but also violations of the District of Columbia Code. (Title 22, D. C. Code). Prior to the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, the local Court was then known as the Court of General Sessions for the District of Columbia. This Court afforded trials, by Judge or Jury, to those charged with violations of Title 22 of the D. C. Code. The Court of General Sessions had no Grand Jury. Rather, felony cases initiated there would, following a preliminary hearing, be presented by the United States Attorney to a Grand Jury sitting in the United States District Court House.

By its very nature, therefore, the Court of General Sessions, now known as The Superior Court for the District of Columbia, is a Court whereby technical felonies, violative of Title 22 of the D. C. Code are tried as misdemeanors, depending on the plea bargain struck between a defendant and one of the Assistant United States Attorneys. The choice often presented is (1) a misdemeanor plea in the Court of General Sessions and (2) a prospective Grand Jury indictment and a felony

trial in the United States District Court, which Court had concurrent jurisdiction.

The Assistant United States Attorneys who staffed the Court of General Sessions were clothed then, as they are now, with all the expected authority. They, as a matter of policy, make the day-to-day decisions so necessary to the orderly and efficient administration of justice. In some cases, the concurrence of their immediate superior is sought; in others, they act without this concurrence. The Office of the United States Attorney in the Court of General Sessions is headed by a Senior Assistant, who in turn reports to the United States Attorney for the District of Columbia, physically located in the Court House of the United States District Court some four city blocks away.

In this setting, therefore, petitioner found himself charged by the Metropolitan Police with at least two serious felonies growing out of the dispute already alluded to, as well as the misdemeanor involved with the possession of a gun. With the concurrence of the Senior Assistant United States Attorney in the Court of General Sessions, a plea bargain was entered into. The petitioner entered pleas to two misdemeanors. Some weeks after the entry of the pleas, he was informed by the Assistant United States Attorney with whom the bargain had been made, that the United States was going to breach this agreement and seek an indictment in the United States District Court. Petitioner was given the option of withdrawing his misdemeanor pleas; he in fact did so, but with no intention of abandoning his desire to regain his misdemeanor pleas, albeit in another forum—either at the Grand Jury, the United States District Court or the United States Court of Appeals.

It would seem at first glance that petitioner, having been afforded an opportunity to go to trial on felony charges – an opportunity that was his even prior to the plea bargain – should now be precluded from complaint. This, in fact, was the position of the United States in the United States Court of Appeals. This assumes, however, that petitioner was bound to litigate his insistence that the United States honor its agreement only in the Court of General Sessions. This would have been a futile effort, since the United States had already informed petitioner that no matter what action he took in the Court of General Sessions, the United States would none the less seek a felony indictment in the United States District Court. Hence, and with the added threat of the Judge in the Court of General Sessions to commit, without apparent or articulated reason, the petitioner to a mental institution, the petitioner chose to litigate the issue of the deliberately broken plea bargain not in that forum, but at the United States District Court level. Petitioner's every effort from that day to this, was directed toward the goal of compelling the United States Attorney to honor his commitment.

Whether specific performance should have been granted, or whether the withdrawal of the guilty pleas and a return to the status quo was the proper remedy, petitioner maintains that it is a decision that should have been made by a Court, not the prosecutor. *Santobello v. New York*, 404 U.S. 257 (1971). While there is no absolute right to have a guilty plea accepted, *Lynch v. Overholser*, 369 U.S. 705, 719 (1962), yet as this Court said in *Santobello:*

> "Disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons. It leads to prompt

> and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement of those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

The petitioner contends now, as he did at every prior step of the judicial process that he was ready to abide by the original agreement and plead guilty to two misdemeanors. He also cited in his brief in the United States Court of Appeals the reasons why, in any court, it is necessary that protagonists in the judicial arena be able to trust the word, one of the other. Plea bargains made in good faith should be kept.

The petitioner would have been satisfied to have a judicial officer rule on the question of specific performance versus a return to the status quo, as was the case in *Santobello.*

While petitioner cannot dispute the authority of the United States Attorney to overrule decisions of his Assistants, yet it would seem that where an agreement or plea bargain has been made, then breached, that for the office of he who breached the bargain to decide the proper remedy would be to disregard the spirit of *Santobello* where this Court left the remedy not to the New York Prosecutor but to the Courts of that state. Petitioner asks no more and no less.

II.

THE APPELLATE ARGUMENT OF THE UNITED STATES, IN THE UNITED STATES COURT OF APPEALS MISSTATED THE FACTS AND THUS DEPRIVED THE PETITIONER OF DUE PROCESS.

The duty of the prosecutor is to be fair; to prosecute with vigor, but while he may strike hard blows, he is not at liberty to strike foul ones. *Viereck v. United States,* 318 U.S. 236, 87 L.Ed. 734, 63 S.Ct. 561, *63 Am. Jur. 2nd Sec. 27: Berger v. United States,* 295 U.S. 78, 1935.

The United States struck such a foul blow in its argument to the United States Court of Appeals. (Appendix E). It is simply untrue that petitioner in any way breached his agreement with the United States. Prior to his withdrawal of his guilty pleas to the two misdemeanors, petitioner had been informed, through counsel, that the United States intended to breach the agreement by obtaining a felony indictment. Yet the clear implication of the brief filed by the United States lays the blame for the breach on petitioner's doorstep. This argument was made knowing it to be unfounded in fact.

While the United States never admitted to the existence of a bona fide plea bargain in the United States Court of Appeals, by implication and, indeed, by clearly articulated argument, the Assistant United States Attorney who wrote the brief told the United States Court of Appeals that petitioner failed to honor his part of the agreement by his very act of withdrawing the misdemeanors pleas. Nothing could be farther from the truth; the United States implied a readiness on its part to honor the agreement, to abide by a plea agreement but claims as an excuse for not so doing, the failure of the

petitioner to keep his word. It simply did not happen that way; the argument is untrue and has effectively deprived the petitioner the due process of law to which he is entitled. It would seem clear that had the prosecutor originally felt that the petitioner was somehow reneging on his word, that there would have been forceful opposition to the very withdrawal of the misdemeanor pleas. In fact, there was consent; consent because the prosecutor knew then, as he does today, that the breach was his.

Petitioner and the United States thus accuse each other. Neither the Judge in the Court of General Sessions, the Trial Judge in the United States District Court, nor the Judges of the United States Court of Appeals have chosen to ask of the United States the only question really pertinent, i.e., "did the United States fail to honor an agreement with petitioner?" Petitioner respectfully moves this Court to ask the question and specifically requests this Court to cause the Trial Judge to hold a hearing that the truth may be determined.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN H. TREANOR, JR.
and
JOHN L. SMITH, JR.
Suite 202, Presidential Bldg.
6525 Belcrest Road
Hyattsville, Maryland 20782
Counsel for Petitioner

August, 1973

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 72-1437 — September Term, 1972
Criminal Action 478-70

United States of America
v.
Ernest H. Byrd,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Leventhal and Robb, Circuit Judges, and William Jameson* United States Senior District Judge for the District of Montana

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed for the reasons set forth in the attached memorandum.

The duty of counsel is fully discharged without filing a suggestion for rehearing *en banc* unless the case meets the

*Sitting by designation pursuant to 28 U.S.C. § 294(d)

rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court

Hugh E. Kline
Clerk

No. 72-1437 – United States v. Byrd

MEMORANDUM

The appellant was convicted on two counts charging him with assault with a dangerous weapon and one count charging him with carrying a dangerous weapon. He was sentenced to 18 to 54 months on count three (assault on Stanley Janulewicz with a dangerous weapon), 2 to 3 years on count six (assault on James F. O'Donnell with a dangerous weapon), and one year on count seven (carrying a dangerous weapon), the sentences to run concurrently, but with the direction that appellant be incarcerated for only 4 months, the imposition of the remainder to be suspended, and appellant to be on probation for 5 years.

On this appeal the appellant contends that the indictment should have been dismissed because (1) he was denied a speedy trial, (2) the governmentt failed to produce certain tape recordings, and (3) the government breached a plea bargain made with him. He also contends that the District Court erroneously refused to grant his request for an instruction on the lessor included offenses of simple assault and threats to do bodily harm.

The facts are somewhat complex. Briefly, it appears that one of the complaining witnesses, James F. O'Donnell, a lawyer, had represented Byrd for several years in various matters but at the time of the alleged assaults this professional relationship had been discontinued. On the night of October 22, 1969, O'Donnell and Stanley Janulewicz went to the Sportsman's Lounge, a restaurant and bar on Wisconsin Avenue. Byrd and several other men were drinking at the bar. After some amicable conversation between Byrd and O'Donnell the talk turned to the appellant's business problems and the appellant then told O'Donnell "I ought to blow your head off." At this point the appellant produced a pistol and pointed it at O'Donnell who grabbed it and deflected the appellant's aim by raising his hand. In the ensuing struggle, the gun was fired twice but O'Donnell was not hit and he fled from the lounge. Byrd then turned to Janulewicz who had tried to assist O'Donnell and said "now I think it's your turn." Janulewicz attempted to wrest the gun from the appellant but before he succeeded in doing so three more shots were fired, one of which struck Janulewicz in the thigh. The police arrived, arrested the appellant in a nearby restaurant, and took him back to the Sportsman's Lounge to which O'Donnell had returned. When the appellant there confronted O'Donnell he struck him, knocking him to the floor.

Originally the appellant was charged in the Court of General Sessions with simple assault on O'Donnell and carrying a dangerous weapon. He pleaded guilty, apparently as a result of a "plea bargain" with the United States Attorney. He says that later, before he was sentenced in the Court of General Sessions, he learned that he was to be indicted for assault with a dangerous weapon and he also learned that the judge in the Court of General Sessions contemplated his commitment to St.

Elizabeths Hospital for a mental examination. As a result, with the consent of the government, the appellant withdrew his guilty plea in the Court of General Sessions and the government dismissed the charges pending there.

The indictment was returned March 25, 1970. The trial took place February 8, 1972. The appellant claims the indictment should have been dismissed for lack of a speedy trial. Without reciting the somewhat complicated details of the matter, however, it appears that the reason for the delay was that during the interim the appellant was acting as a police informant in an investigation then under way and that he consented to the delay. In addition, there is no showing that he was prejudiced by the delay. Accordingly, we think his argument has no merit.

Assuming that the appellant pleaded guilty in the Court of General Sessions as a result of a plea bargain, it appears that he voluntarily withdrew his plea and thereby abrogated the agreement, whatever it may have been.

While the appellant was acting as their informant the police made a number of tape recordings of conversations between the appellant and other persons involved in the police investigation. The appellant moved for discovery and inspection of all such tape recordings, and the motion was granted without opposition from the government. Fourteen reels of tape were produced for the appellant's inspection. He was also provided with a transcript of a recorded conversation with one of the government witnesses in the assault case, a man named Williams, but the police could not locate the recording of this conversation. The appellant claims that the indictment should be dismissed because this tape was not produced. He also claims that the government was at fault because it failed to produce two other recordings, one a recording of a conversation between the appellant

and a police captain concerning a loan by the appellant to the captain, and the other, a recording of a conversation between the captain and one of appellant's attorneys regarding this loan. We think there is nothing to the appellant's complaint on this score. There was no showing whatever that the recordings which were not produced had anything to do with the charges upon which the appellant was being tried. Furthermore, the appellant made no attempt to examine the police stenographer who had transcribed the missing recording, nor did he call as a witness the attorney who had the recorded conversation with the police captain.

The evidence did not justify an instruction on simple assault or threats to do bodily harm.

APPENDIX B

[Caption Omitted in Printing]

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

HUGH E. KLINE
Clerk

[Caption Omitted in Printing]

PETITION FOR REHEARING
OR REHEARING EN BANC

This petition represents appellant's latest effort to hold the Office of the United States Attorney for the District of Columbia to its word. Appellant's reply brief recites, as did the earlier brief, a series of events which originated with a felony charge. An arm's length plea bargain was

entered into by appellant and the United States. After the entrance of misdemeanor pleas and *before* sentencing, the United States breached this bargain by informing appellant's then attorney that the United States was going to unilaterally break this agreement and seek a felony indictment. Appellant was told by the United States that the United States Attorney would consent to the appellant's withdrawal of the misdemeanor pleas if that were his choice, but *in any event* (i.e., whether he withdrew the pleas or if he did not) the United States would seek a felony indictment. It would seem to go without saying, that this course of action, i.e., the promise *not* to seek a felony indictment, was the prime consideration of the initial agreement.

The appellant contends that at the moment he was so informed, the United States had broken its agreement; had breached the bargain; had gone back on its word.

The appellant and the undersigned cannot understand the incredible position taken by the United States in the brief for the appellee, wherein the United States Attorney lays the blame for the breach's dishonor upon the appellant's doorstep. It is simply untrue.

Whatever the appellant did from the moment of the breach by the United States, whatever legal tactics he employed, however inartful may have been his counsel's response to Judge Gesell, it would seem to this writer that to allow the United States to escape the consequences of its deliberate breach of a bargain freely made, would be to allow the United States to indulge in an exercise of intellectual dishonesty insofar as its representations to this Court are concerned. The government either kept its word or it did not. The appellant maintains that he committed no breach, and specifically maintains that the United States did. The undersigned feels that his words carry serious implication – they are

not written easily. However, if the mutual trust so necessary in our adversary system is to be preserved, at least insofar as this writer is concerned, then a full airing of the facts surrounding the breach should, we respectfully submit, be granted.

Respectfully submitted,

John H. Treanor, Jr.
Attorney for Appellant
2nd Floor, Presidential Bldg.
6525 Belcrest Road
Hyattsville, Maryland 20782
Phone: 779-8110

[Certificate of Service Omitted in Printing]

APPENDIX C

EXCERPTS FROM TRANSCRIPT

[Caption Omitted in Printing]

Washington, D.C.
January 31, 1972

The above-entitled cause came on for hearing on Defendant's Motion to Dismiss before the HONORABLE GERHARD A. GESELL, United States District Judge, at 3:00 p.m.

APPEARANCES:

WILLIAM BLOCK,
Assistant United States Attorney,
Counsel for Government

JOHN TREANOR, Esq.,
JOHN LOUIS SMITH, Esq.,
Counsel for Defendant

* * * * *

[29] PROCEEDINGS

(Defendant present in the courtroom.)

THE CLERK: Criminal No. 478-70, the United States v. Ernest H. Byrd. Mr. William Block for the Government. Mr. John Treanor and Mr. John Louis Smith for the Defendant.

MR. TREANOR: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Treanor. You may proceed.

MR. TREANOR: Thank you.

If Your Honor pleases, I would like at this time, I may, in order that the Court may have some idea where I intend to go, or hope to go during this hearing, to tell the Court what I think it is not, what direction I don't think we are going in.

If Your Honor pleases, this, of necessity, calls for an accounting on my part of the record as I know it. Now I think the record in this case is really in two parts, may it please the Court.

On October 23, then, of 1969, papers were filed for the first time in the then Court of General Sessions against my client, Mr. Byrd. He was charged then on a police form and by the arresting officer with assault with a dangerous weapon on one victim, Janulewicz. He was also charged at that time with carrying a dangerous weapon.

I was not his counsel at that time and the record [30] in that Court will reflect that his counsel then was a Mr. Albert Ahern. Now what followed that day up until a day in March of 1970, I think bears some significance on this case. I talk, therefore, of the initial period of October 23, '69 through March 6, 1970, a period of five months and one week. During that time, if Your Honor pleases, the prosecutor in the Court of General Sessions—and I, parenthetically, say that I know that a fast reaction might be that what happened there is of no concern of this Court. I think it is only in the sense perhaps that it has to do with time.

Now on that date, the charge of assault with a dangerous weapon on Mr. Janulewicz was reduced by the head of the United States Attorney's office, Mr. Moore, as a result of an agreement to which we were not party, but which Albert Ahern, Mr. Bird, the Defendant, and the United States Attorney were a part to or a part of,

and an agreement was reached whereby a plea to two misdemeanors could be and were in fact entered.

Now at a time subsequent to then, and with the case then in the presentence status, and at a period prior to March the 6th, it is our understanding that because of a complaint made by Mr. James O'Donnell, an attorney who was present and a prospective complainant, and the complainant in the case before Your Honor, because of a complaint made by him to the United States Attorney, Mr. Flannery, the bargain, so to speak struck out between my client, his lawyer and the United States [31] Attorney's representative, Mr. Moore, was vitiated by Mr. Flannery.

By that time, after this decision had been made, my small law firm and myself entered the picture as retained counsel for Mr. Byrd. This was at a time, if the Court please that Mr. Byrd's case was then in the hands of the Court of General Sessions probation office.

Now, after a number of conversations with Mr. Work the gist of which were that since one complainant, that is, Mr. O'Donnell, was untouched, as it were, unaffected as it were, by the misdemeanor bargain that had been made, the Government would proceed by way of a grand jury original to an indictment in the District Court against Mr. Byrd.

Now this left his counsel, myself and Mr. Smith, in a quandry. We, therefore, on the date set for sentence, which was March the 6th of 1970, went before the then sentencing judge, Judge Alexander. At that point, I tell the Court now, we were unsure as to what exactly we would do, as so often is the case in that Court.

Judge Alexander announced in my presence from the bench that it was his intention to commit Mr. Byrd to St. Elizabeth's Hospital. If we had a quandry before, may it please the Court, this ended it. We therefore, withdrew,

with the consent of the United States, our plea, or Mr. Byrd's plea entered on two misdemeanors. And I can tell this Court now [32] that the paramount reason was the manifest unfairness, at least in our minds, of a prospective stay in St. Elizabeth's Hospital for our client.

This then was followed in early 1970 by the return of a grand jury original, as promised by Mr. Flannery.

THE COURT: In other words, you chose not to hold the United States to the bargain.

MR. TREANOR: Under the threat of our client going to St. Elizabeth's Hospital, we did, that is correct.

THE COURT: Yes.

MR. TREANOR: And I could say, since Your Honor prompts, I think, this answer, that it would have had little effect anyhow, since there were two complainants, and since the misdemeanor transaction at the Court of General Sessions involved only one, a Mr. Janulewicz. Therefore, Mr. O'Donnell remains until this day a viable complainant no matter what we did with the other case.

With the return, therefore, of the grand jury original, this came back in late February of 1970—the plea was entered on the 2nd of March, 1970—just a little bit before the collapse of the deal, if I may use that word, at Fifth and E Street, the issue then became joined in this Court.

* * * * *

APPENDIX D

[Caption Omitted in Printing]

MOTION TO DISMISS AND/OR SET ASIDE VERDICT

Comes now the defendant, through his attorneys, and informs the Court as follows:

On October 23, 1969, the defendant was charged in the then Court of General Sessions for the District of Columbia in Criminal No. 39404-69, with assault with a dangerous weapon on one Stanley Janulwicz. Following the institution of this charge and while the date for the preliminary hearing was pending, an arrangement was entered into by the defendant's then attorney, Albert Ahern, and Mr. Charles Wouk, Assistant United States Attorney, by which the defendant agreed to plead guilty to two misdemeanors growing out of the same circumstances—rather than to stand trial on the then pending felony.

Consequently, on December 15, 1969, Criminal No. 39404-69 was dismissed by the United States and by pre-arrangement, new papers were drawn charging the defendant with two misdemeanors (Criminal No. 46711-69) carrying a dangerous weapon and simple assault (with the complaining witness one James F. O'Donnell). (Note that both O'Donnell and Janulwicz were complainants in events that happened at the same time and at the same location).

On the same date, December 15, 1969, with the consent of the United States, pleas of guilty were entered to both misdemeanors before Judge Charles Halleck. The matter was referred to the Probation Department for a presentence report, was continued to January 21, 1970, and again to February 18, 1970. On January 30, 1970,

Judge Halleck transferred the matter to Judge Harry Alexander for sentencing, citing "personal reasons."

In the meantime and prior to the scheduled sentence date of February 18, 1970, the undersigned was retained by the defendant, replacing Albert Ahern, Esquire. The undersigned was then told by Mr. Charles Wouk, Assistant United States Attorney, that despite the prior agreement and the "fait accompli" of the entrance of the plea of guilty to carrying a dangerous weapon and simple assault, that the United States was going to indict the defendant on felonies of assault with a dangerous weapon, with Messrs. O'Donnell and Janulwicz as complainants, as well as with the offense of carrying a dangerous weapon and other related offenses. Counsel was informed by the United States that the reason for this action was the unhappiness of the complainant O'Donnell over the minor nature of the misdemeanor charges. Counsel was further informed that the defendant would be allowed to withdraw his misdemeanor pleas. On the day of sentencing before Judge Alexander, by now set for March 6, 1970, the defendant was informed by Judge Alexander that the Probation Officer had recommended commitment to Saint Elizabeth's mental hospital. The defendant then exercised his option to withdraw his guilty pleas. The misdemeanor cases were dismissed and the defendant was then indicted by the Grand Jury, the indictment being filed on March 25, 1970.

The defendant maintains that an agreement was reached between himself and by the United States, that he plead guilty to the misdemeanors per this agreement; that the United States violated this agreement and that he is entitled to be returned to that status. He maintains that following the announcement by the United States that felony indictments would be sought, that he then entered into negotiating with other members of the United States

Attorney's Office as an informer, and that his assumption of this role and his withdrawal of his guilty pleas in the face of threatened commitment to a mental institution amounted to an involuntary relinquishing of the right to have judicial determination of the propriety and indeed the constitutionality of the United States insofar as their agreement was breached unilaterally.

Whereupon the defendant respectfully requests the Court to grant him relief by way of specific performance of a contractual agreement which took the form of "plea-bargaining" and which, in it's breach, has occasioned the defendant over two further years of involvement in the criminal process.

John H. Treanor, Jr.
Attorney for Defendant
850 Washington Building
Washington, D.C. 20005
Phone: 638-6996

[Caption Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND/OR SET ASIDE VERDICT

1. *Santobello v. New York*, (S.Ct. December 20, 1971, No. 70-98).

2. *United States v. James*, Sup. Ct. of D.C., Criminal No. 56862-71, March 2, 1972 slip opinion. Opinion per Thompson, Jr.

John H. Treanor, Jr.
Attorney for Defendant
850 Washington Building
Washington, D.C. 20005
Phone: 638-6996

[Certificate of Service
Omitted in Printing]

APPENDIX E

III. THE TRIAL JUDGE IMPROPERLY DENIED APPELLANT'S MOTION FOR DISMISSAL OF THE INDICTMENT WHICH FOLLOWED THE GOVERNMENT'S FAILURE TO KEEP AN ORIGINAL AGREEMENT WITH THE APPELLANT.

Turning to the matter of the "plea bargain," appellant argues as follows: that in the then Court of General Sessions, and with the consent of the United States, he forego his right to be tried, either by Court or jury, on any of the existing charges, and instead entered pleas of "guilty" to two misdemeanors–each with a maximum sentence of one year's incarceration. That the United States, keeping it's promise initially, dismissed any existing felony charge. Although the United States (and the appellant) knew that there were at least two complainant's, *i.e.*, O'Donnell and Janulewicz, yet the original plea bargain expressly included a plea to simple assault on the one and a promise not to charge, or indict, on the other. Shortly after the entrance of the aforesaid misdemeanor pleas, appellant was notified that the United States would not honor this consummated bargain, but would seek an indictment on felony charges–this in fact occurred.

In appellant's view, the events of the next two years were a direct outgrowth of this broken promise. He assumed the distasteful role of police informer; he consented to the wearing of a bugging device as the police (to whom he had been assigned by the United States Attorney) conducted an "investigation;" had the original bargain been kept, he would have accepted whatever sentence Judge Alexander would impose (in the then Court of General Sessions) had the word of the United States been good, he would have been spared the

ignominy of his role as an informant; had the bargain been kept, appellant, a restauranteur holding Alcoholic Beverage Control licenses in the District of Columbia, would never have had the ensuing business, legal and economic, difficulties which were to become his lot as a convicted felon.

In *Santobello v. New York*, 92 S.Ct. 495 (1971), a similar bargain was made. The defendant there pleaded guilty to one misdemeanor, when faced with two felony counts. The bargain included the prosecution's promise not to allocute at time of sentencing. This bargain was broken by the government when a second prosecutor recommended a maximum sentence. The Court said, in the majority opinion:

> "The staff lawyer and a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing.' '. . . that the breach of agreement was inadvertent doesn't lessen it's impact."

The remedy in *Santobello*, was either specific performance of the agreement or the withdrawing of the guilty plea. The case left the choice, not to the defendant, but to the State.

Appellant withdrew his guilty pleas, it is true. Had he refused to do so, he might have then raised, with a forthcoming indictment containing the same charges by another, more aggravated name, a compelling argument of double jeopardy. Faced with immediate commitment to Saint Elizabeth's Mental Hospital at the very instant when this decision had to be made, the appellant chose the only realistic course open to him—freedom from that commitment and time to argue his contractual case further with the United States. Had the word of the United States been good, the events of those two years would never have occurred. Appellant would neither have been available nor willing to assume the informant's role;

his problems with the Alcoholic Beverage Control Board would have been minimized; he would never have been convicted of a felony, and yet he would have been properly subjected to a possible maximum prison term of two years. Appellant kept his side of the bargain—he maintains that *Santobello* imposes no less a duty on the United States.

APPENDIX F

III. THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT ON THE GROUND THAT THE GOVERNMENT HAD BREACHED A PLEA BARGAIN WITH HIM.

(M. Tr. 29-33)

At the hearing on January 31, 1972, appellant also moved to dismiss the indictment on the ground that the Government had broken a plea bargain with him (M. Tr. 29-33).[8] Appellant represented to the court that the United States Attorney's Office had agreed to drop the felony charge of assault with a dangerous weapon against appellant and to allow him to plead to two misdemeanors, each of which carried a maximum punishment of one year's imprisonment.

On December 15, 1969, appellant pleaded guilty to simple assault (22 D.C. Code §504) and carrying a dangerous weapon (22 D.C. Code §3204) in the Court of General Sessions. On March 6, 1970, appellant appeared for sentencing on these pleas of guilty before Judge Harry T. Alexander. According to appellant's proffer, Judge Alexander announced his intention to commit appellant to Saint Elizabeths Hospital for a mental examination. Upon being advised of Judge Alexander's intention, appellant withdrew his pleas of guilty to the two misdemeanor charges. The felony charges were subsequently reinstated, leading to appellant's conviction in the District Court and in turn to this appeal.

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[8] Appellant reiterated this ground in his "Motion To Dismiss and/or Set Aside the Verdict" which was filed after the trial was over. This motion was also denied.

Appellant's counsel informed the court at the January 31 hearing that the "paramount reason [for the withdrawal of the guilty pleas] was the manifest unfairness, at least in our minds, of a prospective stay in Saint Elizabeths Hospital for our client" (M. Tr. 32). The court said to appellant's counsel, "In other words, you chose not to hold the United States to the bargain," and counsel replied, "Under the threat of our client going to Saint Elizabeths Hospital, we did, that is correct" (M. Tr. 32). Thereafter the court denied appellant's motion to dismiss the indictment. Appellant now contends that this ruling was error because "[a]ppellant kept his side of the bargain and he maintains that *Santobello* [*v. New York*, 404 U.S. 257 (1971)] imposes no less a duty on the United States" (Appellant's brief at 27).

Appellant admits that he voluntarily withdrew his pleas of guilty to the two misdemeanors solely to avoid commitment to Saint Elizabeths Hospital by Judge Alexander (Appellant's brief at 27). In other words, as the trial court characterized his actions, he "chose not to hold the United States to the bargain" (M. Tr. 32). It is patently clear that it was appellant who breached the plea bargain and thereby relieved the Government from any further obligation under it. His withdrawal of his guilty pleas renders *Santobello* inapposite. Appellant cites no case, and we have found no case, which holds that the Government has a continuing obligation to abide by a plea agreement even after the defendant has failed to honor his part of the bargain. Appellant's withdrawal of his guilty pleas manifestly nullified the agreement, and thus his subsequent indictment did not amount to a breach, since the plea bargain had effectively been rescinded by appellant's own actions.[9]

SUPREME COURT, U. S.

FILED

OCT 25 1973

MICHAEL RODAK, JR., CLERK

No. 73-326

In the Supreme Court of the United States

OCTOBER TERM, 1973

ERNEST E. BYRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government violated his right to due process on the ground that it failed to honor a plea bargain.

On October 22, 1969, petitioner was arrested following an altercation in a Washington, D.C., bar, the details of which are set forth in the memorandum of the court of appeals (Pet. App. 2a-3a).

On December 15, 1969, in the District of Columbia Court of General Sessions, petitioner entered pleas of guilty to two misdemeanors, simple assault (22 D.C. Code 504) and carrying a dangerous weapon (22 D.C. Code 3204).[1] On March 6, 1970, petitioner appeared for sentencing but withdrew his guilty pleas prior to

[1] The government made no stipulation concerning further prosecutions at this hearing.

pronouncement of sentence. Petitioner was thereafter indicted on seven felony counts.

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on two counts of assault with a deadly weapon and one count of carrying a dangerous weapon, in violation of 22 D.C. Code 502 and 3204. He was sentenced to concurrent prison terms of 18 to 54 months and of one to three years on the assault counts, and one year on the weapons count. The court of appeals affirmed (Pet. App. A).

Petitioner asserts (Pet. 3) that his guilty plea to the original misdemeanor charges was the result of a plea bargain with the United States Attorney's office, and that the pleas were withdrawn because the United States Attorney's office reneged on the bargain by informing him that it would seek felony indictments despite petitioner's plea to the misdemeanors. However, at a subsequent hearing, petitioner's counsel admitted that the reason for withdrawal of the guilty pleas was to avoid commitment of petitioner to Saint Elizabeth's Hospital, which the judge of the Court of General Sessions announced was his intention prior to determination of sentence (Tr. 29-32).[2] The district court inquired of petitioner's counsel: "In other words, you chose not to hold the United States to the bargain," and counsel replied, "Under the threat of our client going to St. Elizabeth's Hospital, we did, that is correct" (Tr. 32).

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[2] "Tr." designates the transcript of the hearing on motions on January 31, 1972.

It is thus clear on this record that it was petitioner who rescinded the plea bargain, thereby relieving the government from any further obligation under it. His withdrawal of his guilty plea renders *Santobello* v. *New York*, 404 U.S. 257, inapposite. The government has no continuing obligation to abide by a plea agreement after the defendant has failed to honor his part of the bargain.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.